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No._____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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OKLAHOMA CORPORATION COMMISSION,

*Petitioner,*

v.

HARRY R. CARLILE TRUST,
ZELDA ARTHURS, TRUSTEE,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

---

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May 4, 1987

## QUESTION PRESENTED

Does OKLA. STAT. tit. 52 §87.1(a), authorizing the Oklahoma Corporation Commission to establish initial drilling and spacing units, violate the Fourteenth Amendment to the United States Constitution in a case where only nonproducing leaseholds are included in the proposed initial drilling and spacing unit and where notice of the hearing is rendered by publication, as provided in the statute?

## PARTIES

*Petitioner*

Oklahoma Corporation Commission

*Respondent*

Harry R. Carlile Trust, Zelda Arthurs, Trustee

Also participating below were Cotton Petroleum Corporation, appellant below; and the following as amici curiae:

Mobil Oil Corporation
Oklahoma Independent Petroleum Association
Phillips Petroleum Company
Sun Exploration & Production
Kerr McGee Corporation
Exxon Corporation
Cities Service Oil & Gas Corporation
Walker Oil Company, Inc.
Amoco Production Company
Bass Production Company
Tenneco Oil Company
Union Oil Company of California
Mustang Production Company
CNG Producing Company
Atlantic Richfield Company
Shell Western E & P Inc.
Harry A. Spring
Robert J. Spring
Tom Spring
Roger Spring
D.B. Cladwell
Oaktree Petroleum Corporation
The Adaptable Tool Company
Anadarko Beach Exploration Company

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

---

The petitioner Oklahoma Corporation Commission respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oklahoma entered in this proceeding on April 22, 1986; rehearing denied on February 3, 1987.

## OPINION BELOW

The opinion of the Oklahoma Supreme Court, reported as *Harry R. Carlile Trust v. Cotton Petroleum Corporation*, 732 P.2d 438 (Okl. 1986), appears in the Appendix herein beginning at page 1a. The order denying rehearing appears in the Appendix herein beginning at page 23a.

## JURISDICTION

The judgment of the Oklahoma Supreme Court was entered on April 22, 1986. A timely petition for rehearing was denied on February 3, 1987. This petition for certiorari was filed within 90 days of that

date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## STATUTORY PROVISIONS INVOLVED

OKLA. STAT. tit. 52 §87.1(a):

> Whenever the production from any common source of supply of oil or natural gas in this state can be obtained only under conditions constituting waste or drainage not compensated by counterdrainage, then any person having the right to drill into and produce from such common source of supply may, except as otherwise authorized or in this section provided, take therefrom only such proportion of the oil or natural gas that may be produced therefrom without waste or without such drainage as the productive capacity of the well or wells of any such person considered with the acreage properly assignable to each such well bears to the total productive capacities of the wells in such common source of supply considered with the acreage properly assignable to each well therein.
>
> (a) To prevent or to assist in preventing the various types of waste of oil or gas prohibited by statute, or any of said wastes, or to protect or assist in protecting the correlative rights of interested parties, the Corporation Commission, upon a proper applica-tion and notice given as hereinafter provided, and after a hearing as provided in said notice, shall have the power to establish well spacing and drilling units of specified and approximately uniform size and shape covering any common source of supply, or prospective common source

of supply, of oil or gas within the State of Oklahoma; provided, that the Commission may authorize the drilling of an additional well or wells on any spacing and drilling unit or units or any portion or portions thereof or may establish, reestablish, or reform well spacing and drilling units of different sizes and shapes when the Commission determines that a common source of supply contains predominantly oil underlying an area or areas and contains predominantly gas underlying a different area or areas; provided further that the units in the predominantly oil area or areas shall be of approximately uniform size and shape, and the units in the predominantly gas area or areas shall be of approximately uniform size and shape, except that the units in the gas area or areas may be of nonuniform size and shape when they adjoin the units in the oil area or areas; provided further that the drilling pattern for such nonuniform units need not be uniform, and provided further that the Commission shall adjust the allowable production within said common source of supply, or any part thereof, and take such other action as may be necessary to protect the rights of interested parties. Any order issued pursuant to the provisions hereof may be entered after a hearing upon the petition of any person owning an interest in the minerals in lands embraced within such common source of supply, or the right to drill a well for oil or gas on the lands embraced within such common source of supply, or on the petition of the Conservation Officer of the State of Oklahoma. When such a petition is filed with the Commission, the Commission shall give at least fifteen

days' notice of the hearing to be held upon such petition by one publication, at least fifteen (15) days prior to the hearing, in some newspaper of general circulation printed in Oklahoma City, Oklahoma, and by one publication, at least fifteen (15) days prior to the date of the hearing, in some newspaper printed in the county, or in each county, if there be more than one, in which the lands embraced within the application are situated. Except as to the notice of hearing on such a petition, the procedural requirements of Sections 86.1 et seq. of this title, shall govern all proceedings and hearings provided for by this section.

## STATEMENT OF THE CASE

On August 27, 1974, Monsanto Company, a party unrelated to this controversy, filed an application with the Oklahoma Corporation Commission ("Commission") in Cause CD No. 39566 to create 640 acre drilling and spacing units for gas and gas condensate produced from the Springer and several other common sources of supply underlying Section 14, Township 11 North, Range 11 West, Caddo County, Oklahoma, and seventeen other surrounding sections in the same common source of supply. Pursuant to OKLA. STAT. tit. 52 §87.1(a), notice of the aforementioned spacing application was given by one publication at least fifteen (15) days prior to its hearing in a newspaper of general circulation printed in Oklahoma County, and by one publication at least fifteen (15) days prior to its hearing in a newspaper of general circulation printed in Caddo County, Oklahoma. No other notice was given to or received by the Harry R. Carlile Trust ("Carlile") relative to the spacing application.

Pursuant to the notice, the Commission heard Monsanto Company's application on September 17, 1974, and issued Order No. 107773 on September 24, 1974, granting Monsanto Company's application,

thereby creating a 640 acre drilling and spacing unit for gas and gas condensate from the Springer formation underlying Section 14, Township 11 North, Range 11 West, Caddo County, Oklahoma. During this period of time and immediately prior thereto, there was no well being commenced nor was oil or gas being produced in Section 14.

On June 28, 1978, predecessors in title to Carlile, i.e. Zelda Carlile and Harry R. Carlile, executed an oil and gas lease in favor of Joseph K. Caskey which was subsequently recorded in Book 772 at pages 155-156 of the Caddo County Clerk's office. This lease provided for a primary term of four years from August 13, 1978, and was assign to Cotton Petroleum Corporation ("Cotton") by instrument recorded in Book 772 at Page 154. This lease was properly executed and bonus and delay rentals were timely tendered and received. The lease is the only interest claimed by Cotton in the property and is the only interest which Carlile sought to have quieted.

Cotton commenced drilling operations in Section 14 within the primary term of the lease and continued diligent drilling operations until a well capable of producing gas and gas condensate from the Springer formation was completed. The exact location of the well is at a point 2,365 feet from the south line and 1,520 from the west line of Section 14, being outside of the area covered by Carlile's lease, but within the 640 acre drilling and spacing unit established by Commission order.

On August 13, 1982, Carlile top leased the same acreage to Midland Oil Company, a party unrelated to this action. As bonus for the lease, Carlile received a draft for $120,240.00 payable upon the lease of Cotton being judicially terminated. On September 28, 1982, Carlile filed its Petition in Caddo County District Court to cancel Cotton's lease, alleging Carlile to be the owner of the following real property, to-wit: NW/4 and W/2 SW/4 of Section 14, Township 11 North, Range 11 West, Caddo County, Oklahoma; further alleging in general terms that Cotton had no right, title or interest in the property.

On March 4, 1983, Cotton filed its Motion for Summary Judgment and Brief in support thereof alleging that no substantial controversy existed, and attached to said motion as exhibits, a copy of the lease in dispute, an affidavit and a certified copy of Commission Order No. 107773.

On July 26, 1983, Carlile filed its Motion for Summary Judgment and Brief in support thereof alleging that the Commission Order establishing the 640-acre unit was void since publication notice alone is constitutionally deficient.

On August 17, 1983, the District Court sustained Carlile's Motion for Summary Judgment, denied Cotton's Motion for Summary Judgment, quieted Carlile's title and barred Cotton from asserting any right, claim, lease or interest in the property.

On Septmeber 27, 1983, Cotton filed its appeal with the Oklahoma Supreme Court raising as error the District Court's ruling that publication notice to mineral owners does not meet the minimum standards of due process in Commission hearings which seek to establish drilling and spacing units for common sources of supply underlying lands on which no oil or gas is being produced nor any well has been commenced.

On October 24, 1983, the Commission was granted leave to intervene as an appellant in the cause pursuant to motion of October 17, 1983.

The Oklahoma Supreme Court ultimately held that significant property interests are affected by the formation of drilling and spacing units even when nonproducing mineral interests are sought to be embraced within the proposed unit, therefore, constitutionally entitling interest owners to notice reasonably calculated to apprise them of proceedings to be conducted. The Commission contends that the opinion reflects the majority's inability to understand the nature of a mineral interest and to address with specificity how a mineral owner's interest in a nonproducing leasehold is a "significant property interest" which warrants personal notice of Commission

action when no oil or gas has been reduced to possession.

On petition for rehearing filed with the Oklahoma Supreme Court, the Commission once more urged that there was no significant property interest worthy of due process protection afforded by the Fourteenth Amendment. Such petition for rehearing was summarily denied without opinion.

Pursuant to the Commission's motion to stay issuance of mandate, the Oklahoma Supreme Court, on February 23, 1987, issued its order staying the effectiveness of the mandate "for ninety (90) days from the date hereof, in order to afford the parties an opportunity to seek a writ of certiorari in the Supreme Court of the United States, and if such proceedings be instituted, the stay shall continue until their conclusion, or until further order of this Court."

## REASONS FOR GRANTING THE WRIT

### THE DECISION OF THE OKLAHOMA SUPREME COURT CONFLICTS WITH ITS OWN PRIOR DECISIONS AND DECISIONS OF THIS HONORABLE COURT AS TO THE SCOPE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND AS TO THE VALIDITY AND CONSTITUTIONALITY OF OKLA. STAT. tit. 52 §87.1(a).

The essence of the Oklahoma Supreme Court opinion below is that action by the Commission to establish an oil and gas drilling and spacing unit determines property rights protected by the Constitution and, as such, the notice standards of *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), and *Cravens v. Corporation Commission,* 613 P.2d 442 (Okl. 1980), are applicable. An important legal effect of such a holding is to deny the constitutionality of OKLA. STAT. tit. 52 §87.1(a) which, *inter alia,* sets out the notice requirements for drilling and spacing proceedings in Oklahoma.

1. Nature of a Mineral Interest

It is important that this Court understands that Oklahoma recognizes the rule of capture. Basically, the rule of capture provides that the owner of mineral rights underneath a tract of land owns any oil or gas produced through a well drilled on that tract, whether or not the oil and gas so produced originally underlaid his property or that of his neighbors. Thus, whoever reduces the hydrocarbons to possession is the owner. This necessarily encourages each owner to drill his own well and to produce it as rapidly as possible, thus tending to result in the drilling of more wells than necessary and production at a rate which decreases ultimate total recovery.

To prevent the waste associated with exploration and production under the rule of capture while protecting the rights *inter sese* of mineral interest owners, Oklahoma enacted a comprehensive scheme for the regulation of oil and gas production and exploration, which limits the number of wells that can be drilled and the rate at which they can be produced. As part of that scheme, the Commission, a constitutionally created administrative agency with some powers of a court of record, is charged with exercising the police power of the State in the interest of conserving the State's natural resources. *Russell v. Walker,* 160 Okl. 145, 15 P.2d 114 (1932). The Commission is also authorized to establish drilling and spacing units covering common sources of supply of oil and gas for the dual purpose of insuring that common sources of supply are conservatively developed and at protecting the correlative rights of all persons with interests in such common sources of supply. Such drilling and spacing units may cover up to 80 acres for sources of supply which are predominantly productive of oil and may cover up to 640 acres for those predominantly productive of gas. OKLA. STAT. tit. 52 §87.1 "[U]pon entry of a spacing order . . . ., royalty interests arising from land covered by such order are pooled by operation of law, but working interests therein are pooled only upon a voluntary agreement or upon a separate commission forcing unitization [Commission forced pooling in which personal notice

is required to be served upon all interest owners within the drilling and spacing unit.]" *Petroleum Reserve Corp. v. Dierksen,* 623 P.2d 602, 605 (Okl. 1981), citing *Whitaker v. Texaco, Inc.,* 283 F.2d 169, 172 (10th Cir. 1960).

Once a drilling and spacing unit has been established, a proportionate share of production from any well drilled therein is allocated to all separate mineral interest owners in the unit. Only one well can be drilled in a drilling and spacing unit unless the Commission finds that additional wells will assist in the prevention of waste, drainage or injury to correlative rights.

Oil and gas leases, including the one involved herein, typically are made for a set term of years (the primary term) plus as long thereafter as oil and gas are produced from the leased premises in paying quantities. Since production from a unit well is treated legally as if it had been produced from each separately owned tract within a drilling and spacing unit, such unit well production serves to extend the life of all leass within the unit for as long as it continues. Permanent cessation of production causes the leases to terminate.

In the case of *Ohio Oil Co. v. Indiana,* 177 U.S. 190 (1900), it was held that a state may regulate the production of oil or gas by its police power in the interest of resource conservation without infringing upon due process interests. In *Ohio Oil,* as in the case herein, the central issue was whether the regulatory action by the state affected property which was protected by the Fourteenth Amendment. This issue is central because if no property right, in the Fourteenth Amendment sense, is held by the complaining party, then no due process protection is available. If no protected property right is infringed, there is nothing to be brought under the guaranties of the Fourteenth Amendment.

The Court, making an excellant, exhaustive and detailed outline of the nature of the interests held by mineral owners, concluded that the owner of mineral interests in land, under Indiana law, have no title whatever to the oil and gas underlying the land until

their efforts to capture the minerals has resulted in dominion and control by actual possession. Without possession of the oil and gas, the mineral owner was without grounds to complain of due process violations by the state regulatory agency. The rule is the same in Oklahoma as shown by its application by the Court in *Champlin Refining Company v. Corporation Commission,* 286 U.S. 210 (1932), at 233-234.

The Oklahoma Supreme Court has repeatedly held that the State may exercise its police power through the Commission. In *Landowners Oil, Gas & Royalty Owners v. Corporation Commission,* 420 P.2d 542 (Okla. 1966), the Oklahoma Supreme Court held that the Commission had authority, through exercise of its legislatively assigned police power, to establish drilling and spacing units. The Court in *Landowners,* at 544, clearly upheld the well spacing authority of the Commission as proper under constitutional due process standards:

> In *Patterson v. Stanolind Oil & Gas Co.,* 182 Okl. 155, 77 P .2d 83, and *Wood Oil Co. v. Corporation Commission,* Okl., 268 P.2d 878, we held that regulation by the state under its police powers of the drilling of oil and gas wells into a common source of supply and the distribution of the production among owners of mineral rights in land overlying the common source of supply does not violate provisions of either State or Federal Constitutions prohibiting taking of property without due process of law.
>
> In *Oklahoma Natural Gas Company v. Long,* Okl., 406 P.2d 499, we stated the following:
>
> The right of the Legislature to act under the police power of the state is a part of the existing law at the time of the execution of every contract, and as such becomes in contemplation of law

a part of that contract.

We also stated:

> Well spacing is a valid exercise of the police power of the State in the interests of conservation of our natural resources, and private contractual provisions requiring the drilling of a well to tap these resources must yield where in conflict with such spacing regulations.

But the Oklahoma Supreme Court in the instant case held that the notice portion of the Oklahoma spacing statute could not withstand constitutional scrutiny. The keystone of the opinion appears at 732 P.2d at 443 where the Court states, "Because significant property interests are affected when the formation of a drilling and spacing unit is sought, interest owners are constitutionally entitled to notice which is reasonably calculated to apprise them of proceedings to be conducted." The sole rationale offered for such a position is *Cravens, supra.* Such reliance is grossly misplaced and reflects a complete misunderstanding of the nature of the mineral interest involved herein. *Cravens* concerned the question of whether holders of producing mineral interests were entitled to the minimum due process standards laid down in *Mullane.* Clearly, where a respondent's proceeds from the sale of oil or gas must be shared or reallocated as a result of a Commission spacing order, then such order directly and adversely affects that respondent's legal rights. But that is not the case here. Here, the subject is the establishment of drilling and spacing units embracing only nonproducing mineral interests. There are no proceeds to be shared. No oil or gas has been reduced to possession. No rights have vested or equities changed due to the oil and gas in place. The key difference between producing and nonproducing mineral interests can be illustrated by using the analogy nof a contigent remainder.

A remainder has been created in favor of Mr. Jones but it is subject to a condition precedent. That condition is the actual drilling for, and reduction to possession of,

oil and gas. Until such drilling and production occurs, all Mr. Jones has is the possibility of an estate--the possibility that one day production will be obtained on his leasehold or within the drilling and spacing unit of which his interest is a part. Not until fulfillment of the condition precedent may Mr. Jones's interest be said to vest. Not until fulfillment of the condition precedent is there a "significant property interest" which is entitled to Fourteenth Amendment protection.

In *Mullane, supra,* this Court stated that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (at 314, 70 S. Ct. at 657) {citations omitted}. Certainly, personal notice is always adequate. However, Commission submits that it is not indispensable in all circumstances. Due process requires only that the notice be appropriate to the nature of the case without creating impossible or impractical obstacles to concluding the proceeding. Ultimately, the interests of the State in preventing the waste of valuable hydrocarbons by overdrilling must be balanced against the individual interest sought to be protected. See, also, *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed.2d 180 (1983). Hence, due to the speculative nature of the mineral interest at issue herein and the interest of the State in preventing waste, the Commission submits that under the facts herein there are no significant property interests entitled to Fourteenth Amendment protection.

2. Legislative Authority

The State exercises its legislative authority in order that "the right of the common owners, the public, to reduce to possession, may be ultimately efficaciously enjoyed." *Ohio Oil Co. v. Indiana,* 117 U.S., at 210. Prior to the Oklahoma Supreme Court's decision herein, there was little doubt that the creation of drilling and spacing units by the Commission was entirely a legislative function. However, adherence to the Oklahoma Supreme Court's decision herein denies

absolutely the legislative nature of the initial spacing hearing.

Considering another Oklahoma case, *Bridal v. Cottonwood Creek Conservancy District No. 11,* 405 P.2d 17 (1965), cert. denied 382 U.S. 943 (1965), as recently as 1965 the Oklahoma Supreme Court recognized that the creation of spacing units was fundamentally a legislative function. A comparison with other conservation statutes is made 405 P.2d, at 30:

> Notice by publication is different from service by publication as those terms are used in our statutes, and the present Conservancy Act is not the only legislative enactment providing for proceedings affecting property rights, without requiring either personal service or service by publication. *See, for instance, the Oklahoma Oil and Gas Conservancy Act (Tit. 52 O.S. 1961, §81 et seq.) with particular attention to the type of notice prescribed for well spacing petitions (Section 87.1 of the same title).* (Emphasis added.)

The Court in *Bridal* was considering the sufficiency of notice by publication in establishing water conservancy districts, and determined that the Legislature may affect property rights without notice to the holders of those rights and that it may also exercise such legislative authority through a board or commission. The Oklahoma Supreme Court, by its holding herein, denies the authority of the Legislature to provide for exercise of such police power without imposing upon itself due process notice constraints. The effect of such a ruling could invalidate all legislation which does not give notice to the interested parties.

The Legislature and the Commission obviously recognize the prospective legislative nature of an initial spacing hearing by the fact that the statute and the Commission rules require more stringent notice

standards in proceedings subsequent to the initial spacing hearing. Oklahoma Corporation Commission Rules of Practice, Rule 8-2; Appendix Page 24a. Many legislative proceedings are enacted each year that profoundly affect personal or property rights where no notice is given to interested parties. Legislative acts affecting how much tax we pay, how fast we can drive our cars amd many other enactments by the Legislature are actions which affect our personal and/or property rights. Certainly the action before the Commission to establish a drilling and spacing unit is a proceeding, but such statutes are not conclusive as to whether or not it is a proceeding to which parties are entitled to be served with notice. Legislative action originates its authority through the police power of the state. Actions which originate through the police power of the state are not subjects within the due process clause of the Constitution.

If the Legislature itself established a 640-acre drilling and spacing unit encompassing nonproducing leaseholds, this court would surely uphold such an action, notwithstanding lack of actual notice to interested parties. And, in fact, the Legislature acted in 1977 by amending OKLA. STAT. tit. 52 §87.1 to reduce the maximum size of drilling and spacing units from 1440 acres to 640 acres plus 10% tolerance. Although the Legislature has authority to establish drilling and spacing units by enactment of general law, it has seen the wisdom in delegating the authority to the Commission because of the geographical and geological variances across the state. There are numerous conditions which must be considered by the Commission in determining what size unit should be established. OKLA. STAT. tit. 52 §87.1(a) also places limits upon the authority of the Commission to act. For example, a unit cannot be established exceeding a maximum of 640 acres for a gas well plus a 10% tolerance; any oil formation cannot be spaced more than 40 acres if less than 4,000 feet below the surface nor more than 80 acres if less than 9,990 feet. It is clear that the establishment of drilling and spacing units is not an arbitrary decision by the Commission since specific criteria is set forth in the Oklahoma statutes.

This concept of delegation was recognized in

*Patterson v. Stanolind Oil & Gas Co.*, 182 Okl. 155, 77 P.2d 83 (1938), appeal dismissed, 305 U.S. 376 (1939), at 161, wherein the Court stated:

> Counsel recognized the well settled rule that the legislature may enact a law, complete within itself, the object of which is a general purpose, and, for the purpose of carrying the act into operation, may delegate to administrative agencies the power to prescribe details in connection with the administration and enforcement of said law.
>
> * * * * * * * * *
>
> Though, we believe in the principle that an act whose enforcement is trusted to any agency of the government should be definite and certain enough to let the agency know what the Legislature intended to provide for and how the legislative will is to be carried out in the administration and enforcement of the act, still we must also recognize that there are certain subjects of legislation in which the application of this principle is necessarily limited. In our estimation, well spacing is such a subject. We believe it would be impossible for the Legislature to lay down a definite standard by which it could be determined correctly just when and under what conditions an oil-producing area should be divided into drilling units and what size and shape the units should be.

Establishment of drilling and spacing units by the Commission is clearly legislative in nature and no notice is mandated by the Constitution as a legal prerequisite. The decision below is clearly in error in light of prior opinions and justifies the grant of certiorari to review the holding below.

3. Consequences and Scope

The far-reaching and unwarranted detriment to oil exploration, investment and production in Oklahoma provides another important reason for review of the decision below.

Were the decision left intact, millions of dollars would be unnecessarily added to the cost of finding and producing hydrocarbons by the pursuit of protection of a non-existent right to notice of a legislative hearing. The inevitable increase in costs would originate in the necessity to search the Oklahoma land title records for each proposed drilling and spacing unit and to give notice to each mineral owner. Such an addition to the already burgeoning regulatory burden on oil producers creates a substantial imposition not intended by the Legislature and not required under the Constitution.

It should be noted that most other Western oil producing states have similar notice provisions in effect for the initial hearing to establish proration or drilling and spacing units. The issue is not limited to Oklahoma. The issue is nationwide in its scope, significant in its impact.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Oklahoma Supreme Court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Petition for Writ of Certiorari were mailed to the persons listed below on the 1st day of May, 1987, by placing same in the U.S. Mail with postage fully prepaid.

All parties required to be served have been served.

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Lindil C. Fowler, Jr.

# APPENDICES

## APPENDIX

HARRY R. CARLILE TRUST,
Zelda Arthurs, Trustee,
*Plaintiff-Appellee,*

v.

COTTON PETROLEUM CORPORATION,
a Corporation,
*Defendant-Appellant,*

and

OKLAHOMA CORPORATION COMMISSION
*Intervenor-Appellant.*

No. 61112

Supreme Court of Oklahoma.

April 22, 1986.

As Corrected April 23, 1986.

As Corrected May 5, 1986.

Rehearing Denied Feb. 3, 1987.

Appeal from the District Court, Caddo County;

Milbern Jay Adams, Judge.

Mineral lessee appeals from summary judgment, quieting the landowner's title against its lease held by production within the established spacing unit but outside the leasehold and adjudging the Corporation Commission spacing order facially invalid for want of notice meeting the minimum standards of due process.

JUDGMENT REVERSED.

GORDON F. BROWN, SCOTT D. BOUGHTON, BROWN AND LOCKHART, Oklahoma City, for Appellant Cotton Petroleum Corp.

GRETCHEN HOOVER, Deputy General Counsel, LESLIE WILSON PEPPER, Asst. Gen. Counsel, Oklahoma City, for Appellant Oklahoma Corporation Commission.

CLEETA JOHN ROGERS, Oklahoma City, for Appellee.

OPALA, Justice.

This appeal presents for our decision four questions dealing with the standards of adequate notice for Corporation Commission spacing proceedings: {1} Is the Corporation Commission called upon to act in an adjudicative capacity when its statutory power is invoked to establish a drilling and spacing unit? {2} In Corporation Commission proceedings to establish a drilling and spacing unit, is notice to interested persons subject to the minimum standards of fairness exacted by the Due Process Clause? {3} Do the standards of due process, announced by this court in *Cravens v. Corporation Commission*,[1] govern when *non-producing mineral interests* alone are sought to embraced within a spacing unit? {4} Should the teaching of *Cravens* be applied retroactively *to include only Carlile* (the victorious quiet-title plaintiff below), or purely prospectively to affect those spacing units comprised of non-producing leaseholds which will be formed by orders promulgated *after* the effective date of today's pronouncement? While we answer the first three questions in the affirmative, in response to the fourth question we hold that (a) today's pronouncement is to apply prospectively to spacing units which will be formed by Commission orders made *after* the effective date of this opinion, (b) *all* spacing orders made by the Commission prior to this opinion's effective date herein shall be left unaffected by the notice standards pronounced today, but (c) orders yet to be made in proceedings presently pending before the Commission and those in cases now on direct appeal, in which *areas under production* are sought to be, or were comprised within a spacing unit, shall be regarded as governed by notice standards of *Cravens* and (d) the district courts may treat as *facially invalid* all agency spacing and drilling orders issued after the effective date of this opinion which do not comply with the notice standards pronounced herein.

[1] Okl., 613 P.2d 442 (1980)

In 1974 a party not involved in this lawsuit brought an application to the Corporation Commission (Commission) to create several 640-acre drilling and spacing units for gas and gas condensate produced from formations underlying various sections of land in Caddo County. The property here in contention was included within one of the new units to be formed. It consisted of a tract of land then owned in fee simple by the predecessors in title of the plaintiffs, Harry R. Carlile Trust by Zelda Arthurs, trustee (Carlile).

In compliance with the legislative requirements then in force[2] and pursuant to its own statute-implementing rule,[3] the Commission gave notice of hearing on the spacing application *solely* by publication in Oklahoma and Caddo counties. No other notice relative to the hearing was ever sent to, or received by, Carlile's predecessors in title. The Commission heard the application and issued its order creating a 640-acre drilling and spacing unit which included the Carlile tract. According to the record, no oil and gas was being produced from this section of land immediately before and at the time the Commission was commenced.

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[2] The terms of 52 O.S.Supp.1982 § 87.1(a) provide in pertinent part:
"* * * When such a petition is filed with the Commission, *the Commission shall give at least fifteen (15) days' notice* of the hearing to be held upon such petition *by one publication,* at least fifteen (15) days prior to the hearing, in some newspaper of general circulation printed in Oklahoma City, Oklahoma, and *by one publication,* at least fifteen (15) days prior to the date of the hearing, in some newspaper printed *in the county,* or *in each county, if there be more than one,* in which the lands embraced within the application are situated...." (Emphasis supplied.)
This statute was later amended in 1984 and 1985 by changes not pertinent to the questions addressed in this opinion. Okla.Sess.L.1984, Ch. 58 § 1 and Okla.Sess.L.1985, Ch. 141 § 2.

[3] Rule 12(b), Oklahoma Corporation Commission General Rules of Procedure, provides:
"*Oil and Gas Conservation:* Notice of an application or complaint relating to conservation of oil and gas shall be published one time at least fifteen (15) days prior to the hearing in a newspaper of general circulation published in Oklahoma City, Oklahoma and in a newspaper published in each county in which lands embraced in the application are located. (52 O.S.Supp.1980, § 87.1, 52 O.S.1971, §§ 97 and 287.1 et seq.) (8-15-81)"

In 1978 Carlile's predecessors in title[4] executed an oil-and-gas lease that was subsequently assigned to Cotton Petroleum Corporation (Cotton). All bonus and delay rentals due under this lease were timely paid. Cotton commenced drilling operations on the unit created by the spacing order and completed the well within the primary term of the lease. Its location was *outside* the area included in the lease but *within* the spacing unit established by the 1974 order.

Some eight years after formation of the spacing unit, Carlile brought in 1982 this quiet-title suit against Cotton. The 1978 lease constituted the only interest Cotton claimed in the Carlile property and the sole cloud Carlile sought to remove from its title. By stipulation of the parties the complete record of the spacing proceedings was incorporated into the evidentiary material tendered with the motion for summary judgment. This record clearly confirms that the Commission attempted *no* service other than by publication. Because no actual notice had been given to its predecessors in title, Carlile claimed the 1974 order was facially invalid. Based on the due process notice standards announced in *Cravens*,[5] the trial court declared that, because publication notice alone was insufficient to invest the Commission with adjudicative cognizance, the 1974 spacing order was facially ineffective. After Carlile had recovered summary judgment, Cotton appealed and Carlile moved here for an order requiring Cotton to post an undertaking in the form of a "supersedeas bond." The motion met with this court's adverse disposition.[6]

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[4] Harry R. Carlile and Zelda Carlile were shown as lessors on the 1978 lease.

[5] See footnote 1 *supra*.

[6] In its order denying Carlile's motion to set "supersedeas bond" this court held that: (1) Cotton may not be compelled to suspend the effectiveness of the cancellation decree under review. *State ex rel. Mose v. District Court of Marshall County*, 46 Okl. 654, 149 P. 240 (1915); *McClain v. Starr*, 50 Okl. 738, 150 P. 666 (1915) and *Nicholson v. State*, 132 Okl. 298, 270 P. 567 (1928), (2) the trial court's decree is not subject to supersedeas, 12 O.S. 1981 § 968 and *Wilks v. Wilks*, Okl., 632 P.2d 759 (1981), and (3) Carlile is free to invoke judicial process for carrying the trial court's decree into effect and to avail itself of the remedies prescribed by law for the enforcement and satisfaction of its judgment.

## I

## THE DISTRICT COURT MAY WITHHOLD LEGAL RECOGNITION FROM A COMMISSION ORDER THAT IS FACIALLY INVALID

By its collateral attack Carlile attempted to avoid the legal effect of the 1974 spacing order. A collateral attack may not be launched on a Commission order that is facially invulnerable.[7] The district court's power to inquire into the validity of Commission orders is legally limited to ascertaining, from an inspection of the face of the proceedings,[8] if the Commission had jurisdiction to issue the order.[9] A Commission order is deemed facially invalid *only* when the face of the record reveals the absence of *at least one* of these three requisite elements of agency jurisdiction–i.e. (1) jurisdiction over the parties, (2) jurisdiction over the subject matter, or (3) jurisdictional power to issue the specific order in question.[10]

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[7] Art. 9 § 20, Okl.Const. and 52 O.S.1981 § 111. Section 111 provides in pertinent part:
"No collateral attack shall be allowed upon orders, rules and regulations of the Commission...."

[8] The district court's inquiry into the presence of the requisite jurisdictional elements was confined to an inspection of the proceedings; i.e., the application, the process by which the parties were notified and the Commission's order.

[9] *McDaniel v. Moyer,* Okl., 662 P.2d 309, 312 (1983); *Chancellor v. Tenneco Oil Company,* Okl., 653 P.2d 204, 206 (1982); *Gulfstream Petroleum Corp. v. Layden,* Okl., 632 P.2d 376, 379 (1981); *Woods Petroleum Corp. v. Sledge,* Okl., 632 P.2d 393, 396 (1981) and *State v. Corporation Com'n,* Okl., 590 P.2d 674, 677-(1979).

[10] *Gulfstream Petroleum Corp. v. Layden, supra* note 9 at 379.

## II

## THE STATUTORY AUTHORITY OF THE COMMISSION TO ESTABLISH DRILLING AND SPACING UNITS IS ADJUDICATIVE IN NATURE AND IT IS SUBJECT TO FEDERAL AND STATE STANDARDS OF DUE PROCESS GOVERNING THE ADEQUACY OF NOTICE TO CONFER JUDICIAL JURISDICTION

The applicability of due process standards of notice to proceedings for the formation of drilling and spacing units turns on whether the Commission's authority to space calls for an exercise of its *adjudicative* or *rulemakiing* function. An agency's authority to make rules is clearly distinguishable from that of adjudication. *Rulemaking* includes the power to adopt *rules* and regulations of general application–both substantive and procedural–which are legislative in nature, operate prospectively and have general application.[11] *Orders* of an administrative body are *adjudicative* in character. They apply to named persons or specific situations and have immediate rather than future operation.[12]

The Commission acts in a legislative capacity when it exercises its rulemaking powers to prevent waste and to protect correlative rights, but not when it attempts to apply these rules. The application of rules to the facts found constitutes an exercise of adjudicative function.[13]

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[11] *State ex rel. Villines v. Freeman,* Okl., 370 P.2d 307, 310 (1962). In *State ex rel. G. T. Blankenship v. Freeman,* Okl., 440 P.2d 744, 747 (1968) (syllabus 10) legislative facts were distinguished from adjudicative facts in these words: "Facts to which the law is to be applied in the process of adjudication are called adjudicative facts; these are facts 'about the parties' and must be ascertained from formal proof, as distinguished from 'legislative facts' which are general and may be judically noticed from legislative source materials for the purpose of determining the meaning, effect, content or validity of enactments."

[12] *State ex rel. Villines v. Freeman, supra* note 11 at 310 and *State ex rel. G. T. Blankenship v. Freeman, supra* note 11 at 747.

[13] *H. F. Wilcox Oil & Gas Co. v. State,* 162 Okl. 89, 19 P.2d 347, 348 (1933); *Halpin v. Corporation Commission,* Okl., 575 P.2d 109, 111 (1978) and *May Petroleum v. Corp. Com'n of State of Okl.,* Okl., 663 P.2d 716, 717 (1983).

When acting in its legislative capacity, the Commission may always amend its rules and regulations to prevent waste and to protect rights of mineral owners.[14] But because orders are adjudicative in character, they may not be amended absent a showing of changed conditions.[15] The same adjudication/rulemaking dichotomy governs the process of determining whether, under the Administrative Procedures Act (APA),[16] an act of the Commission constitutes *a rule* subject to the Act's requirement or *an order* which is free from those requirements. While the Commission is not generally subject to the provisions of the APA–except the section which mandates that state agencies with rulemaking powers file copies of their rules and regulations[17] –settled law follows the APA standards by excluding from the requirement of filing *all* those Commission *actions* that are truly adjudicative in character.[18]

Three distinct legal issues and consequences are implicated in a proceeding to establish spacing units: (1) an area of the common source of supply must be determined and its boundaries identified; (2) royalties within the established unit stand pooled as a result of the unit's formation; and (3) a restriction on the freedom to drill must be imposed.[19] Because spacing clearly calls for a factual finding and affects the proprietary incidents of the mineral estate of every owner sought to be brought

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[14] 52 O.S.1981 § 86.4 (rules governing common sources of supply), § 97 (jurisdiction to make rules and regulations), § 243 (prevention of waste of natural gas) and § 273 (prevention of waste of crude oil).

[15] *Cameron v. Corporation Commission,* Okl., 414 P.2d 266, 271 (1966) and *Phillips Petroleum Co. v. Corporation Commission,* Okl. 482 P.2d 607, 609-610 (1971).

[16] 75 O.S. 1981 §§ 301 et seq.

[17] 75 O.S. 1981 § 304 and *C. F. Braun & Co. v. Corporation Commission,* Okl., 609 P.2d 1268, 1273 (1980).

[18] *State ex rel. Villines v. Freeman, supra* note 11 at 310 and *Cameron v. Corporation Commission, supra* note 15 at 271.

[19] 52 O.S.Supp.1982 § 87.1 and 52 O.S.1981 §§ 287.1 et seq. A spacing order creates the unit, pools royalty interests within the unit, directs that only one well be drilled in the unit within a specific location and prohibits the drilling of a well at another location or operating a well drilled in violation of the spacing order. *Gulfstream Petroleum Corp. v. Layden, supra* note 9 at 379.

within the new unit, we conclude that a quest for the formation of a drilling and spacing unit calls for adjudication rather than rulemaking.

When the Commission acts in an adjudicative capacity it functions much like a court. The general norms of law which govern the quality of notice that must be given in proceedings conducted by judicial tribunals apply with like force and effect to the Commission.[20] The minimum norms of federal and state due process hence must govern the standards of notice to be given in spacing proceedings.[21]

## III

## THE *CRAVENS* STANDARDS OF NOTICE MUST GOVERN IN PROCEEDINGS FOR FORMATION OF A DRILLING AND SPACING UNIT TO BE COMPRISED OF NON-PRODUCING LEASEHOLDS

Because significant property interests are affected when the formation of a drilling and spacing unit is sought, interest owners are constitutionally entitled to notice which is reasonably calculated to apprise them of proceedings to be conducted.

The statutory norm presently in force provides that the Commission give notice of its spacing proceeding *solely by publication*.[22] In *Cravens* [23] we held that this

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[20] *Monson v. State ex rel. Oklahoma Corporation Commission*, Okl., 673 P.2d 839, 841-842 (1983).

[21] *C.F. Braun & Co. v. Corporation Commission, supra* note 17 at 1273; *Wolfenbarger v. Hennessee*, Okl., 520 P.2d 809, 811-812 (1974).

[22] See *supra* note 2 for the text of 52 O.S.Supp. 1982 § 87.1(a). *The statutory notice requirement differs when mineral interests are sought to be pooled. The pooling applicant has the duty to give notice by publication and by mail to those owners of mineral interests whose addresses are known or could be ascertained through the exercise of due diligence.* 52 O.S.Supp. 1982 § 87.1(e). All these notice requirements were left unchanged by the 1984 amendment. Okl.Sess.L.1984, Ch. 58 § 1.

[23] In *Cravens v. Corporation Commission, supra* note 1, the mineral lessees sought to establish, upon publication notice only, a 160-acre drilling and spacing unit which was to consist of their own *non-producing* 80 acres and of another 80 acre tract with a *producing* gas well.

statutorily-prescribed notice form is inadequate–vis-a-vis holders of *producing mineral interests* whose identities were known or could have been ascertained with due diligence–to meet the minimum due process standards laid down in *Bomford v. Socony Mobil Oil Co.*[24] and *Mullane v. Central Hanover Bank & Trust Co.*[25] No less than these notice standards–later implemented by

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[24] Okl., 440 P.2d 713, 718 (1968). In *Bomford* the court said that before a plaintiff may resort to the publication process he must make a diligent search of all available resources. The court indicated that due diligence requires at least a search of local tax rolls, deed records, judicial and other official records, telephone directories, city directories and the like.

[25] 339 U.S. 306, 318-320, 70 S.Ct. 652, 659-660, 94 L.Ed. 865, 875-876 (1950). When a proceeding is likely to affect constitutionally-protected property interests, notice to interested parties must be "reasonably calculated, under all circumstances" to apprise them of the pendency of the action and afford them an opportunity timely to interpose their objections. Id., 339 U.S. at 314, 70 S.Ct. at 657. Notice is a fundamental element of due process as well as a jurisdictional requirement. *Union Texas Petroleum, a Division of Allied Chemical Corporation v. Corporation Commission of State of Oklahoma,* Okl., 651 P.2d 652, 658 (1982), *cert. denied,* 459 U.S. 837, 103 S.Ct. 82, 74 L.Ed.2d 78 (1982) and *Cate v. Archon Oil Co., Inc., infra* note 29 at 1356; see also *Application of Tubbs,* Okl., 620 P.2d 384, 385 and 388 (1980). Before jurisdiction may be exercised over a person in proceedings that may directly and adversely affect his legally protected interests, the minimum standards of due process require notice that is calculated to provide knowledge of the proposed exercise of jurisdiction and an opportunity to be heard. *Union Texas Petroleum, supra, Cravens, supra* note 1 and *Application of Tubbs, supra.* The right to a hearing is of little value unless adequate notice is given.
Our due process clause in Art. 2 § 7, Okl. Const., has a definitional sweep that is coextensive with its federal counterpart. *McKeever Drilling Co. v. Egbert,* 170 Okl. 259, 40 P.2d 32, 36 (1935) and *Matter of Rich,* Okl., 604 P.2d 1248, 1251 (1979). The latter, and hence our own, requires that legal process affecting property conform to the measure of fairness which accords with the minimum standards of due process.

Rule 16 [26]–is exacted by the fundamental law's shield of protection in proceedings to establish spacing units which are to embrace *only non-producing mineral interests.* Notice in these latter proceedings must not only comply with the statutory standards but also provide affected persons whose whereabouts are know or ascertainable with *knowledge* of the pending proceeding.

Publication notice is not reasonably calculated to provide actual knowledge of instituted proceedings. It is hence inadequate as a method to inform those who could be notified by more effective means such as personal service or mailed notice.[27] Mail service is an inexpensive and far more efficient mechanism to enhance the reliability of notice than either publication or posting.[28] When a party's name and address are reasonably ascertainable from sources available at hand, communication by mail or other means certain to insure actual notice is deemed to be *a constitutional*

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[26] Rule 16, Rules for District Courts, 12 O.S. 1981, Ch. 2 App., provides the procedural measures that must be followed before a judgment may be taken against a defendant served solely by publication. A trial tribunal must conduct an inquiry to determine whether the plaintiff made a diligent search of all reasonably available sources when a default judgment is sought. After hearing the evidence, if the judge finds that the plaintiff did in fact exercise due diligence in conducting a meaningful search a standard recitation to that effect is to be included in the journal entry of judgment. See *Johnson v. McDaniel,* Okl. 569 P.2d 977, 980-981 (1977). The statutory counterpart of Rule 16 is found at 12 O.S.Supp. 1984 § 2002 (C) (3) (e).

[27] *Application of Tubbs, supra* note 25 at 385 and 388.

[28] *Greene v. Lindsey,* 456 U.S. 444, 455, 102 S.Ct. 1874, 1880, 72 L.Ed.2d 249, 258-259 (1982). In *Greene,* the Court held that posting a summons on the door of a tenant's apartment was an inadequate means of providing notice of forcible entry and detainer. See also *The Postman Never Rings Twice: The Constitutionality of Service of Process by Posting After Greene v. Lindsey,* The American University L.Rev. 601-641 (1984).

*prerequisite in every proceeding which affects either a person's liberty or property interests.*[29]

Because resort to publication service is constitutionally permissible *only* when all other means of giving notice are unavailable, we hold today that the face of an administrative proceeding must affirmatively show a diligent but unsuccessful effort to reach the affected party by better process.[30] *In short, courts may not presume publication service alone to be constitutionally valid when the judgment roll or record of an administrative proceeding fails to show that the means of imparting better notice were diligently pursued but proved unavailable.*

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[29] *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 103 S.Ct. 2706, 2711-2712, 77 L.Ed.2d 180 (1983). The Court held in *Mennonite* that a mortgagee's knowledge of delinquency in payment of taxes was not the equivalent of notice that a tax sale was pending and that posting and publishing notice of the tax sale and mailing notice to the mortgagor by certified mail did not meet the due process standards of notice. The Court said that a party's ability to take steps to safeguard its interests does not relieve the state of its constitutional obligation to give mailed notice. *Mennonite* represents a major extension of the *Mullane* rationale, *supra* note 25, not only because it involves a direct application of *Mullane* to tax sale proceedings, but also because the Court imposed a requirement on a state to notify landowners, mortgagees, and "those with a legally protected property interest." See *Mennonite Board of Missions v. Adams: Insufficient Notice Under the New York in Rem Statutes,* 33 Buffalo L.Rev. 389-415 (1984). See also *Cate v. Archon Oil Co., Inc., infra* note 42 at 1356.
In *Continental Insurance Co. v. Mosely,* 98 Nev. 476, 653 P.2d 158 (1982), *vacated,* 463 U.S. 1202, 103 S.Ct. 3530, 77 L.Ed.2d 1383 (1983), *on remand,* 683 P.2d 20 (Nev.1984), the*Mennonite* notice standards were applied to a probate case where an identified creditor, whose whereabouts were known, had been notified solely by publication. *Continental* reaffirms the constitutional teaching that publication notice is but a *last resort device* which may be used *only* when it is impossible to ascertain, from available sources at hand, either the identity or the whereabouts of persons who will be adversely affected by the outcome of a judicial proceeding.

[30] See page 12a.

## IV

## THE STANDARDS OF NOTICE PRONOUNCED TODAY SHALL APPLY ONLY TO SPACING UNITS THAT WILL BE FORMED BY ORDERS MADE AFTER THE EFFECTIVE DATE OF THIS OPINION

We must next determine whether (a) our pronouncement today should be given full retroactive effect, and if not, (b) the new rule should be allowed a purely prospective application or (c) its retroactivity should be limited to the case at hand.

### A

### RETROACTIVITY OF THE NEW RULE VIS-A-VIS SPACING UNITS FORMED BY ORDERS MADE BEFORE THE EFFECTIVE DATE OF TODAY'S PRONOUNCEMEN

The United States Constitution neither prohibits nor requires that a judicial decision have retrospective operation.[31] Retroactivity is the common-law's traditional approach to implementing decisions that overrule prior case law. Judicial policy determines whether, and to what extent, a new rule will operate retroactively.[32] In *Thompson v. Presbyterian Hospital,*

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[30] At a minimum, well spacing procedures should include (a) the filing by Commission officials of an affidavit for publication service which reflects the identity of the parties whose whereabouts are unknown for service of process and cannot be ascertained with due diligence, (b) an adjudicative inquiry by the Commission into the sufficiency of the search to ascertain the whereabouts of parties served solely by publication and (c) a recitation in the Commission well spacing order that (1) upon an examination of the record and proof of publication, the Commission found the process to be proper and (2) upon an adjudicative inquiry into the factual issue of due diligence, the Commission found that its officials conducted a meaningful search of all reasonably available sources at hand to ascertain the whereabouts of those entitled to notice but who were served solely by publication.

*A like procedure should be followed in a pooling application. In those proceedings the burden of notice-giving falls on the applicant rather than on the Commission.* See footnote 22 *supra.*

[31] *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364-365, 53 S.Ct. 145, 148, 77 L.Ed.360 (1932); *Linkletter v. Walker, infra* note 34, 281 U.S. at 628-629, 85 S.Ct. at 1737 and *Chevron Oil Co. v. Huson, infra* note 34, 404 U.S. at 106-107, 92 S.Ct. at 355.

[32] *Thompson v. Presbyterian Hospital, Inc.,* Okl., 652 P.2d 260, 268 (1982) and *Griggs v. State ex rel. Okl. Dept. of Transp.,* Okl., 702 P.2d 1017, 1020 (1985).

*Inc.*,[33] the court addressed the standards to be used in withholding retroactivity when a new constitutional rule is pronounced. There, we used the tripartite test of *Linkletter v. Walker*.[34] It calls for consideration of three factors: (1) the purpose of the new rule; (2) the extent of reliance on the old doctrine; and (3) the burden likely to be imposed on the administration of legal process by the increased volume of curative juridical action.

*Cravens* precludes an exercise of adjudicative powers by an administrative agency over persons whose interests in production may be directly and adversely affected unless a diligent effort has been made to give timely personal notice which is reasonably calculated to inform them of an instituted proceeding. Our pronouncement here extends the *Cravens* notice standards to spacing proceedings affecting non-producing leaseholds. More significantly, today's opinion holds that those Commission orders which fail to show on the face of the proceedings a diligent effort to give a better notice than by publication are facially defective. The new norms pronounced by us here represent *a clear break* with a contrary statutory policy of *long standing*.. Spacing order applicants of yore could have justifiably relied on the validity of the legislatively-prescribed procedural norms followed by the Commission and sanctioned by enactments which have been continuously in force for several decades.

Were we to pronounce today that *Cravens* had retroactive effect on *all* previous orders that established spacing units, whether comprised of non-producing or producing leaseholds, our holding would have an adverse impact on the administration of the Commission's adjudication process. It would result in blanket invalidation of countless proceedings. All drill-

[33] Okl., 652 P.2d at 268, *supra* note 32.

[34] 281 U.S. 618, 629, 85 S.Ct. 1731, 1738, 14 L.Ed.2d 601 (1965).
In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971), the Court held that federal courts must consider three factors when deciding whether to give retroactive or prospective effect to a new rule in a federal civil case: (a) whether a new rule establishes a new principle of law not clearly foreshadowed; (b) whether retroactive application will advance or retard operation of the new rule; and (c) whether non-retroactive application is necessary to avoid injustice or hardship. Today's pronouncement is consistent with the current jurisprudence of the U.S. Supreme Court.

ing and spacing orders made under the existing statutory provisions would at once fall as void. A multitude of drilling and spacing units in Oklahoma would no doubt be affected. Oil-and-gas leases held by production from wells located within the unit but outside the demised premises would be threatened with cancellation. In short, a pronouncement with full retrospective scope would doubtless have a destabilizing effect on industry-wide activities.[35]

## B

## THE NEW RULE SHOULD BE GIVEN PROSPECTIVE APPLICATION

The extent of reliance on the old doctrine has a lengthy history as a factor supportive of prospective application for a new rule.[36] The inquiry, when consider-

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[35] *Cravens, supra* note 1, unlike this case, was a *direct appeal* from the Commission. It dealt with a claim to an election after the time limit set in the pooling order because of failure to receive timely notice. There we did not discuss, but left unsettled, the effective reach of that decision. The instant case is a *collateral attack* on the Commission's spacing order. Its retroactive application would have far reaching consequences on oil-and-gas leaseholds throughout the state. Significant hardships would be imposed and settled property interests would be upset by a retroactive imposition of the new requirement. See *Cipriano v. City of Houma,* 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed. 647 (1969).

[36] See Note, Prospective Overruling and Retroactive Application in Federal Courts, 71 Yale L.J. 907, 944-950 (1962) and cases cited therein.
A purely prospective decision has been criticized as an advisory opinion which violates the case-or-controversy requirement in Article III of the U.S. Constitution. See, Note, Prospective Overruling and Retroactive Application in the Federal Courts, *supra* at 930-933. Supporters of pure prospectivity believe that a court does decide a case or controversy even when it applies the new rule in a purely prospective manner. The court can decide the controversy based on the old rule of law and, at the same time, pronounce a new rule of law to be applied in the future to a like case. See Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va.L.Rev. 1557, 1603-1604 (1975); Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va.L.Rev. 201, 216-234 (1965) and Mullamud, Prospective Limitation and the Rights of the Accused, 56 Iowa L.Rev. 321, 333-334 (1970). (cont'd)

ing the reliance factor, is often phrased in terms of whether the new law-changing decision overrules "clear past precedent" or addresses an issue of first impression whose resolution was not "clearly foreshadowed."[37] The resolution of the constitutional issue reached in this case was not clearly foreshadowed either by *Bomford* [38] or by the much later pronouncement in *Cravens*. *Bomford*, which addressed itself to the procedure to be followed before *judicial jurisdiction*[39] may be exercised against one served solely by publication, left *agency practice* unaffected by its teachings. Unlike this case, *Cravens* dealt narrowly and on *direct review* with the effect of publication notice in a proceeding in which an *area under production* was sought to be incorporated in a spacing unit to be formed with non-producing leaseholds. *Cravens* did not explicitly decide whether its effect was limited to the successful litigant therein or would have a fully retroactive sweep. Another signal distinction to notice is that *Cravens* was a *direct appeal* in which we pronounced notice by publication inadequate but left unsettled the issue precisely before us here, i.e., whether the Commission spacing order in a *collateral attack* is facially invalid when it is not apparent on the

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36 (cont'd) Opponents of pure prospectivity argue that, because no benefit will be derived from the advocacy of a new rule, most litigants will have no reason for persuading a court to change its position. Although pure prospectivity often deters those who most need relief and will perpetuate an outmoded legal doctrine, it is at times an essential device for a painless ushering in of a sharply different norm of law. *Cipriano v. City of Houma, supra* note 35. See Mullamud, *supra* at 335, and Mishkin, The Supreme Court, 1964 Term-Forward: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv.L.Rev.56 (1965).

37 *Chevron Oil Co. v. Huson, supra* note 34.

38 See *supra* note 24.

39 *Bomford, supra* note 24 at 718. See *supra* note 26 in which reference is made to Rule 16, Rules for District Courts, 12 O.S.1981, Ch.2, App. See also Restatement (2d) Conflict of Laws §§ 24 et seq. (1971). "Judicial Jurisdiction" in the Restatement is limited to the exercise of judicial jurisdiction by a state through its courts. Id. at § 24, comment (d), p. 107. In *Bomford* only "judicial jurisdiction" was implicated.

face of an administrative proceeding that the person or entity charged with notice-giving exercised a diligent effort to give personal notice to the affected parties.

This case is different from *Snethen v. Okl. State Union of the Farmers Ed. & Co-Op U.*,[40] *Unah By and Through Unah v. Martin*,[41] *Cate v. Archon Oil Co., Inc.*,[42] *Vanderpool v. State*,[43] *Cravens*[44] and *State ex rel. Cartwright v. Dunbar*,[45] in all of which the winning party received the fruits of its victory. The cited cases were reached on *direct appeal;* this one comes in the posture of a *collateral attack.* The distinction we make here between direct appeals and collateral challenges finds ample support in federal jurisprudence.[46] The U.S. Supreme Court has given purely prospective application to new constitutional rules in collateral attacks upon state criminal convictions, resting its decisions upon the

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[40] Okl., 664 P.2d 377, 382 (1983), 38 ALR 4th 531.

[41] Okl., 676 P.2d 1366, 1370 (1984).

[42] Okl., 695 P.2d 1352, 1356 (1985).

[43] Okl., 672 P.2d 1153, 1157 (1983).

[44] See *supra* note 1.

[45] Okl., 618 P.2d 909, 914 (1980).

[46] (a) In *Linkletter v. Walker, supra* note 34, 381 U.S. at 636-640, 85 S.Ct. at 1741-1743, the Court addressed the issue of whether *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) was to be applied retroactively or prospectively. The Court–despite giving the defendant in *Mapp* the benefit of the new constitutional ruling–refused to extend the privilege of the exclusionary rule to the defendant in *Linkletter.* The Court distinguished between cases on direct appeal which received the benefit of the new rule and cases like *Linkletter* which sought collateral review. The Court held that "the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set 'principle of retrospective invalidity'..." Id., 381 U.S. at 627, 85 S.Ct. at 1736. The Court felt that the purpose of the exclusionary rule would not be furthered by applying it to cases already finalized.

consideration of finality in the judicial process. In most instances, the interest in reducing a controversy to a final judgment outweighs the competing interest of readjudicating settled judgments according to legal standards in effect when a collateral attack is made. Society has an interest in the finality of decisions rendered under accepted judicial standards and in the conservation of judical time and expense. This method of adjudication insures stability in the judicial system. Cases in which parties seek the benefit of new rules by a collateral challenge are more likely to impose a greater

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46 (cont'd) (b) In *Solem v Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984) and *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 1069-1070, 84 L.Ed.2d 38 (1985) the issue before the Court was whether the rule in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) should be applied retroactively. Under the *Edwards* rule a criminal defendant's Fifth and Fourteenth Amendment rights are violated when his confession–obtained by a police-instigated interrogation when defendant's requested counsel was not present–is used.

In *Solem, supra*, 104 S.Ct. at 1345-1346–a federal collateral attack upon a state conviction that had become final–the Court held that the rule announced in *Edwards, supra*, should not be applied retro-actively. A key factor under *Solem* is the extent of the reliance by law enforcement authorities on the old standards. 465 U.S. at 643, 104 S.Ct. at 1341. In *Shea, supra*, 105 S.Ct. at 1070, the *Edwards* rule was held to apply retroactively to all cases in which the process of *direct appeal* had not yet been completed when *Edwards* was decided. The Court created a distinction between retroactivity on direct review of a conviction and on collateral attack of a conviction that has become final.

(c) Justice Harlan was of the view that new constitutional rules should be made retroactive to pending criminal cases but saw an obvious difference when the plea before the Court was for retroactivity in a collateral attack. See *Mackey v. United States*, 401 U.S. 667, 675-679, 91 S.Ct. 1160, 1171-1173, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring). There he pointed out that in civil cases the overriding interest of society in finality made collateral attacks on final judgments almost unthinkable. He noted, "[t]his is not to suggest that civil and criminal collateral attack ought necessarily to be precisely congruent in the federal system. But certainly it illustrates that the law has always perceived collateral attack as a problem quite different from direct appeal." *Id.*, 401 U.S. at 683, 91 S.Ct. at 1175. See *Shea v. Louisiana, supra*, 105 S.Ct. at 1070, note 4.

(d) Recent use of limited retroactivity demonstrates its application is confined to those civil disputes over the constitutionality of a state statute in which the challenge is made by direct rather than collateral attack. See *Kirchberg v. Feenstra*, 450 U.S. 455, 462-463, 101 S.Ct. 1195, 1200, 67 L.Ed.2d 428 [1981].

hardship on the administration of legal process. Evidence and records in old cases may deteriorate or become lost.

Other considerations also provide clear support for a purely prospective application in this case. The *new* constitutional rule announced today does not operate here to condemn a prior course of conduct pursued by a private party-litigant. Rather, it corrects a defective agency process of long standing which has received extended and certain statutory sanction. The constitutionally infirm spacing order in contention here was not *procured* nor *caused to be procured* by the lessee or *anyone* in privity with it. Rather, the offending order was on file at the agency and its *existence,* at least constructively, was known and *accepted* by all the parties when Carlile's *predecessor* in title executed the mineral *lease in dispute* and, by its terms, the lease was *expressly* made *subject to* all existing "administrative regulations."[47]

The objective of giving a new rule purely prospective application is to protect the public's reasonable expectations of reliance on prior judicial decisions. Because there is here ample reason for avoiding the significant hardships that would be imposed if this decision were given retroactive effect,[48] we hold that

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[47] The lease terms provide in pertinent part:
"* * * All express or implied covenants of this lease shall be subject to all Federal and State Laws, Executive Orders, Rules and Regulations, and this lease shall not be terminated in whole or in part, nor lessee held liable in damages, for failure to comply therewith, if compliance is prevented by, or such failure is the result of any such Law, Order, Rule or Regulation * * *"

[48] In *Cipriano v. City of Houma, supra* note 35, 395 U.S. at 706, 89 S.Ct. at 1900, the Court held violative of the Equal Protectiiom Clause a state law which gave only property taxpayers the right to vote in elections to approve issuance of revenue bonds by a municipal utility. The Court–holding that the new rule would not be given full retroactive effect–emphasized that "significant hardships" would be imposed on "cities, bondholders, and others connected with municipal utilities" if the decision were given full retroactive effect. The Court noted that where its decision might produce substantial inequitable results if applied retroactively, there was ample precedent for avoiding "injustice or hardship" by a purely prospective holding. (cont'd)

(a) today's pronouncement is to apply prospectively to spacing units which will be formed by Commission orders *after* the effective date of this opinion, (b) *all* spacing orders made by the Commission prior to the effective date of this opinion shall be left unaffected by the notice standards pronounced today, but (c) orders yet to be made in proceedings presently pending before the Commission and in cases now on direct appeal, in which *areas under production* are sought to be, or were, comprised within a spacing unit, shall be regarded as governed by notice standards announced in *Cravens*.[49]

Moreover, were Carlile *alone* allowed to harvest the fruits of today's victory, a *mixed efficacy status* would be impressed upon the drilling and spacing unit here in contest. Because of its apparent constitutional defect, the Commission order under challenge before us would fall as void *only* insofar as it affects a single interest–the oil-and-gas leasehold in this litigation. The spacing regime established by this clouded order would nonetheless remain invulnerable to attack *against every other lessee within the same unit,* even one with an interest as infirm as that of Cotton.

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48 (cont'd) A new rule affecting civil procedure was also given a purely prospective application in *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461, 468, 11 L.Ed.2d 440 (1964). The Court held that the parties had a mistaken view as to the meaning of one of its earlier decisions but that, in the face of support given their view by the lower court and commentators, the parties were acting reasonably in relying upon their misguided view of the law.
In *Wainwright v. Stone,* 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973), the Court reiterated its commitment to *Great Northern R. Co. v. Sunburst Oil and Refining Co.,* 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932), expressing it in the following language: "'A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions.'"

49 We are not extending retroactivity to collateral attacks; saved by today's opinion for application of the *Cravens* notice standards are cases pending in the trial or appellate process in which a direct challenge may be made to a spacing order embracing *areas under production.* See *Hankerson v. North Carolina,* 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1077) and Coor, Retroactivity: A Study in Supreme Court Doctrine "As Applied," 61 N.Carol.L.Rev. 745, 751-752 (1983).

Providing Carlile with a tangible benefit from its forensic triumph would clearly harm both the symmetry and stability of rights in property settled under the existing rules.[50] Sound policy militates against cloaking today's decision with retroactivity limited to Carlile's leasehold. The course to be chosen is that which will avoid hardship to *all* persons who had acted in mistaken reliance on the validity of a long-followed, statutorily-sanctioned rule of procedure.[51]

The trial court's decree of lease cancellation is accordingly reversed; the new standards pronounced today for a constitutionally adequate notice to persons interested in, or affected by, Commission proceedings to establish drilling and spacing units shall operate prospectively to spacing units that will be formed by Commission orders *after* the effective date of this opinion; *all* spacing orders made by the Commission *prior to the effective date of this opinion* shall be left un-

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[50] *Bomford v. Socony Mobil Oil Co., supra* note 24 at 718.

[51] *Cipriano v. City of Houma, supra* note 35, 395 U.S. at 706, 89 S.Ct. at 1900. For Oklahoma cases that used the purely-prospective-operation approach in announcing a new rule, see *Harness v. Myers,* 143 Okl. 147, 288 P. 285, 289-290 (1930); *Oklahoma County v. Queen City Lodge No. 197, I.O.O.F.,* 195 Okl. 131, 156 P.2d 340, 358 (1945); *Gibson v. Phillips University,* 195 Okl. 456, 158 P.2d 901, 903 (1945); *Board of Equalization v. Tulsa Pythian Benev. Ass'n.,* 195 Okl. 458, 158 P.2d 904, 906 (1945); *Yarbrough v. Okla. Tax Comm.,* 200 Okl. 402, 193 P.2d 1017, 1021 (1948), *aff'd.,* 334 U.S. 841, 68 S.Ct. 1510, 92 L.Ed. 1765; *Curtis v. Barby,* Okl., 336 P.2d 616, 621 (1961); *Poafpybitty v. Skelly Oil Co.,* Okl. 394 P.2d 515, 520 (1964); *Fidelity-Phoenix Fire Ins. Co. v. Penick,* Okl. 401 P.2d 514, 517 (1965); *American-First Title & Trust Co. v. Ewing,* Okl., 403 P.2d 488, 496 (1965); *Irwin v. Irwin,* Okl., 433 P.2d 931, 934 (1965); *Hughes v. City of Woodward,* Okl., 457 P.2d 787, 790 (1969); *Kirkland v. General Motors Corp.,* Okl., 521 P.2d 1353, 1368 (1974); *Brickner v. Gooden,* Okl., 525 P.2d 632, 638 (1974); *Elk City v. Johnson,* Okl., 537 P.2d 1215, 1217 (1975); *Keel v. MFA Ins. Co.,* Okl., 553 P.2d 153, 159 (1976); *Scott v. Bradford,* Okl., 606 P.2d 554, 559 (1980); *Southwestern Bell Tel. Co. v. Oklahoma County Excise Bd.,* Okl., 618 P.2d 915, 921 (1980); *Wilsey, Bennett Co. v. Grant,* Okl., 632 P.2d 382, 386 (1981) and *Oklahoma Ed. Ass'n, Inc. v. Nigh,* Okl., 642 P.2d 230, 239 (1982). See also Annot., Prospective or Retroactive Operation of Overruling Decision, 10 A.L.R.3d 1371, 1388, 1394 (1966).

affected by the notice standards pronounced today; but orders yet to be made in proceedings presently pending before the Commission and in cases now on direct appeal, in which *areas under production* are sought to be, or were, comprised within a spacing unit shall be regarded as governed by notice standards announced in *Cravens;* the district courts may henceforth treat as facially invalid all agency orders issued after the effective date of this opinion, unless they comply with the notice standards pronounced herein; mandate shall issue herein ten days after the court's disposition of rehearing, but if no rehearing be sought, then thirty days after this opinion has been promulgated.

JUDGMENT REVERSED.

SIMMS, C.J. AND HODGES,
LAVENDER AND HARGRAVE, JJ., concur.

KAUGER and SUMMERS, JJ., concur in part and dissent in part.

WILSON, J., dissents.

KAUGER, Justice, with whom, SUMMERS, Justice, join, dissenting *only* to the completely prospective application of the opinion.

Neither the United States Constitution nor the Constitution of the State of Oklahoma delineate the effective date of judicial opinions. Subject to limited exceptions, decisions were given retrospective effect at common law.[1] However, the doctrine enunciated by the United States Supreme Court in *Great Northern R. Co. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360, 85 A.L.R. 254 (1932) broadly endorses variations in juristic philosophy involving retrospective and prospective decisions.

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[1] *Robinson v. Neil,* 409 U.S. 505, 507, 93 S.Ct. 876, 877, 35 L.Ed.2d 29 (1973).

My concern is that there be some consistency and predictability in our rulings. Within the last two years, numerous cases including *Cate v. Archon Oil Co., Inc.*, 695 P.2d 1352, 1356 (Okl.1985); *Vanderpool v. State*, 672 P.2d 1153, 1157 (Okl.1983); *Snethen v. Oklahoma State Union of the Farmers Educational and Cooperative Union of America*, 664 P.2d 377, 382 (Okl.1983), have been promulgated. In each, the decision was given effect in the immediate case, and prospectively to all other cases, after either the issuance of the mandate, or on a date certain.

The alleged distinctions between collateral and direct attacks do not necessitate a different treatment than that accorded to recent successful appellants[2] because the judgment was *void ab initio*.[3] If a decision has been adequately foreshadowed, as has the holding in this case,[4] the benefits of the new rule should not be withheld from the prevailing party–nor should similarly situated litigants who properly have preserved the issue on appeal be bypassed, and left unaffected and unprotected in the appellate pipeline.[5]

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[2] Within the last three years, no party has been denied the fruits of the appellate victory.

[3] See *Pointer v. Hill*, 536 P.2d 358, 361 (Okl. 1975); and *Emery v. Goff*, 198 Okl. 534, 180 P.2d 175, 178, 171 A.L.R. 457 (1947).

[4] *Bomford v. Socony Oil Co.*, 440 P.2d 713 (Okl. 1968) was decided 17 years ago.

[5] *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 1069, 84 L.Ed.2d 38 (1985); *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982); *Mackey v. United States*, 401 U.S. 667, 675, 91 S.Ct. 1160, 1164, 28 L.Ed.2d 404 (1971).

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

Tuesday, February 3, 1987

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

Harry R. Carlile Trust, Zelda Arthurs, Trustee v. Cotton Petroleum Corporation etc. and The Oklahoma Corporation Commission.

Rehearing denied.

CONCUR: Hargrave, V.C.J., Hodges, Lavender, Simms, Opala, JJ.

DISSENT: Wilson, Kauger, Summers, JJ.

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Rudolph Hargrave
Vice Chief Justice

## OKLAHOMA CORPORATION COMMISSION
## RULE OF PRACTICE 8-2

RULE 8-2. DRILLING AND SPACING UNITS

(a) Notice of hearing relating to drilling and spacing units shall be published one time at least fifteen (15) days prior to the hearing in a newspaper of general circulation published in Oklahoma City, Oklahoma, and in a newspaper of general circulation published in each county in which lands embraced in the application are located.

(b) When an applicant proposes to establish, vacate, alter, modify, amend or extend a drilling and spacing unit in an area which included, at the time the application is filed, a well commenced to or completed in the common source of supply sought to be spaced, the application and notice shall be served by the applicant no less than fifteen (15) days prior to the date of the hearing, by regular mail, upon each person or governmental entity having the right to participate in production from the proposed drilling and spacing unit, the existing drilling and spacing unit and the existing well.

(c) A plat or plats shall be attached to each application for an order to establish a drilling and spacing unit or units or to extend existing spacing within a common source or sources of supply, which plat shall show the spacing units abutting or overlapping the area to be spaced, and any abutting spacing units in all spaced formations. An amended plat shall be provided at the time of the hearing in the event drilling and spacing units have been established after the application was filed and prior to the hearing to reflect the status of the spacing at the time of the hearing.

(d) An application to extend spacing from an adjacent drilling and spacing unit shall state in the body of the application the most recent order number that created the spacing in the adjacent unit that applies to the common sources of supply which are sought to be extended by the application. Such request to extend spacing and citation to the most recent order number shall be placed in the special relief paragraph of the notice of hearing.

(e) Where a well has not been commenced to or completed in the common source of supply sought to be spaced, notice of hearing for an order to vacate, alter, amend, extend or change a prior spacing order shall be served and published as required in subsection (1) of this rule. Such request to vacate, alter, amend, extend or change a prior spacing order shall be placed in the special relief paragraph of the notice of hearing.

(f) Where two or more orders have issued spacing a common source of supply and such spacing orders have resulted in there being a conflict either as to the size of the unit or as to a common source of supply or a conflict as to the nomenclature of the common source of supply, then the applicant seeking to vacate, alter, amend or change one of the prior spacing orders shall either file an application to construe and modify the conflicting orders or may amend a relevant application to accomplish the same result. Notice of hearing shall be served and published as required upon the commencement of a proceeding.